

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**



ORIGINAL

74-2638

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 74-2638

B  
P/S

GREENE COUNTY PLANNING BOARD,  
Petitioner

v.

FEDERAL POWER COMMISSION,  
Respondent

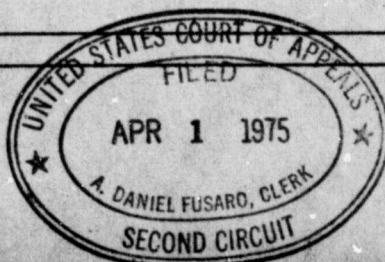
POWER AUTHORITY OF THE STATE OF NEW YORK  
Intervenor

BRIEF OF PETITIONER  
GREENE COUNTY PLANNING BOARD  
ON PETITION TO REVIEW ORDERS  
OF THE FEDERAL POWER COMMISSION

March 24, 1975

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
ISSUES PRESENTED	3
FACTS	4
The Line Goes From Canada Through Greene County to New York City	4
The Line is Part of a Long Range Comprehensive Plan Deeply Affecting Greene County	7
Greene County Intervenes and Asks for Consolidation	9
The FPC Plays its Cat-and-Mouse Games Again	10
The FPC's Decision was Based upon a Gossamer Thin Record	11
I. THE FPC ERRONEOUSLY CONCLUDED THAT ESECA EXEMPTED THE CANADIAN CONNECTION FROM NEPA	13
A. The Plain Meaning of ESECA Is That All Parts of NEPA Other Than Section 102(2) (C) Were to Remain Applicable to the Canadian Crossing	14
B. It is Undisputed That There Has Been No Compliance with NEPA	17
II. THE FPC ERRONEOUSLY DECIDED THAT IT HAD NO DUTY UNDER THE FEDERAL POWER ACT AND EXECUTIVE ORDER NO. 10485 TO MEET ITS COMPREHENSIVE PLANNING OBLIGATIONS WHEN PASSING ON THE CANADIAN CONNECTION EVEN IF COMPLIANCE WITH NEPA WAS NOT NECESSARY	19
A. Executive Order No. 10485 Is a Child of the Federal Power Act	19

B. The Relationship Between the Canadian Connection and Projects Under Part I of the Federal Power Act Brings It Within the FPC's Comprehensive Planning Obligations	22
C. The Executive Order's "Public Interest" Requirement Itself Involves a Comprehensive Review	25
D. By Summarily Issuing the Permit, the FPC Has Violated Both the Federal Power Act and the Executive Order	29
1. The FPC Did Not Permit Adequate Public Participation	29
2. The FPC Did Not Compile A Reviewable Record	30
3. The FPC Did Not Consider All Relevant Factors	31
4. The FPC Did Not Consider Alternatives	32
5. The FPC's "public Interest" Finding Was Not Supported By Substantial Evidence and Was Arbitrary and Capricious	33
CONCLUSION	35
ADDENDUM - Excerpts From Relevant Statutes	
1. Energy Supply and Environmental Coordination Act of 1974 - Section 7(d) (88 Stat. 246)	A
2. Federal Power Act - Section 202(c) (16 USC 824a (c))	A
3. The National Environmental Policy Act - Section 102 (42 USC 4332)	B
4. Executive Order No. 10485 (3 CFR 1949-53 Comp., p. 970)	C

# TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Calvert Cliffs' Coordinating Committee v. AEC,</u> 449 F. 2d 1109 (D.C. Cir. 1971), cert. den. 404 U.S. 942 (1972)	13, 14, 17
<u>Camp v. Pitts,</u> 411 U.S. 138 (1973)	34
<u>Citizens to Preserve Overton Park v. Volpe,</u> 401 U.S. 402 (1971)	34
<u>City of Pittsburgh v. FPC</u> 237 F. 2d 741 (D.C. Cir. 1956)	23, 24, 33
<u>Conservation Society v. Secretary</u> (73-2629) F. 2d __, 5 ELR 20068 (2d Cir. 1974)	24, 31
<u>Federal Radio Commission v. Nelson Bros.</u> B and N Co., 289 U.S. 266 (1933)	25
<u>Greene County Planning Board v. FPC,</u> 455 F. 2d 412 (2d Cir. 1972) cert. den. 499 U.S. 849 (1972)	7, 8, 23, 31
<u>Greene County Planning Board v. FPC,</u> 490 F. 2d 256 (2d Cir. 1973)	7, 8, 10
<u>Hanly v. Kleindienst,</u> 471 F. 2d 823 (2d Cir. 1972), cert. den. 412 U.S. 908 (1973)	14, 27, 30, 34
<u>Hanly v. Mitchell,</u> 460 F. 2d 640 (2d Cir. 1972) cert. den. 409 U.S. 990 (1972)	27
<u>N.Y. Central Securities Co. v. U.S.,</u> 287 U.S. 12 (1932)	25, 27
<u>Scenic Hudson Preservation Conference v. FPC,</u> 354 F. 2d 608 (2d Cir. 1965) cert. den. 384 U.S. 941 (1966)	23, 24, 27, 31, 32
<u>State of California v. FPC,</u> 345 F. 2d 917 (9th Cir. 1965) cert. den. 384 U.S. 941 (1966)	23
<u>Udall v. FPC,</u> 387 U.S. 428 (1967)	26

Statutes:

Federal Power Act

Page

1, 2, 4, 8, 22,  
23, 24, 29, 30,  
33, 34

Energy Supply and Coordination Act of 1974

2, 10, 12, 13,  
14, 16, 21, 25,  
29

National Environmental Policy Act

2, 8, 13, 14,  
15, 17, 18

Administrative Procedure Act

30

Miscellaneous:

Executive Order 10485

3, 4, 14, 15,  
19, 20, 21, 25,  
26, 29, 34

Federal Power Commission Rules and Regulations

9, 20, 26, 28

IN THE UNITED STATES COURT OF APPEALS  
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Greene County Planning Board  
Petitioner,

v.

Federal Power Commission,  
Respondent,

Power Authority of the State  
of New York,  
Intervenor.

No. 74-2638

BRIEF OF PETITIONER  
GREENE COUNTY PLANNING BOARD

PRELIMINARY STATEMENT

This is an action pursuant to Section 313 (b) of the Federal Power Act (16 USC §821 1(b)) to review a final order (R. 130)\* and Permit (R. 135) of the Federal Power Commission ("FPC"), both issued September 13, 1974 in FPC Docket No. E-8414. The FPC denied our petition for rehearing on October 25, 1974 (R. 144).

In the order and Permit, both brought here for review, the FPC erroneously concluded that Section 7(d)

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\* References to pages of the Record are given as "(R.)". A deferred appendix will be filed pursuant to Rule 30(c) of the Federal Rules of Appellate Procedure and § 30(1) of the rules of this Court. The original Record pagination will appear in such appendix.

of The Energy Supply and Environmental Coordination Act of 1974 ("ESECA") (88 Stat. 246, 260) (Ad. A)\* abrogated all of the FPC's responsibilities under the National Environmental Policy Act of 1969 ("NEPA") (42 USC 4321 et seq) and the Federal Power Act (16 USC 791 et seq) to conduct a comprehensive, independent and vigorous analysis of the potential consequences of the extra high voltage electric facility for which FPC approval was requested. Under such Permit and order a 765,000 volt ("765 kv") facility will be constructed by the Power Authority of the State of New York ("PASNY") for the bulk transmission of electric energy between the United States and Canada over hundreds of miles of extra high voltage transmission lines not yet built and from new electric generating facilities directly affecting Greene County.

Petitioner Greene County Planning Board (the "Planning Board") requests that this Court (a) reverse the order and revoke the Permit issued by the FPC and (b) order the FPC to comply with NEPA and the Federal Power Act by conducting the required interdisciplinary consideration of all relevant factors.

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\* Relevant portions of applicable statutes are reprinted in an Addendum to this Brief following the last page thereof. References to pages of the Addendum are given as "(Ad. )". The Table of Contents to this brief includes an index to the Addendum.

ISSUES PRESENTED

ISS

1. Does Section 7(d) of ESECA abrogate all of the FPC's responsibilities under NEPA, among other things, to use a systematic, interdisciplinary approach to decisionmaking, to consider appropriate alternatives and to review an application for an extra high voltage connection with Canada with regard to its long range environmental consequences?

2. Did the FPC err when it issued a permit for an extra high voltage transmission connection with Canada without a hearing or other public participation, without compiling a reviewable record, without considering all relevant factors or alternatives and without exercising either its comprehensive planning judgment under the Federal Power Act or its duty to make findings in the public interest under Executive Order No. 10485?

### FACTS

On September 21, 1973 PASNY filed an application (R.1) with the FPC for permission, under Section 202(e) of the Federal Power Act (Ad. A) and Executive Order 10485 (Ad. C), to construct, operate, maintain and connect 765,000 volt ("765 kv") electric transmission facilities between the United States and Canada (the "Canadian Connection").

#### The Line Goes From Canada Through Greene County to New York City

The purpose of these 765 kv transmission facilities is to bring massive amounts of hydro-electric power from Canada into New York State to be used principally for consumption in New York City. The power would enter New York State in the vicinity of Fort Covington (R. 2). It would be transmitted south via Massena to Edic in the vicinity of Utica,\* then to Gilboa where PASNY has already constructed, under an FPC license, the 1,000,000 watt Blenheim Gilboa pumped storage hydroelectric project (FPC Project No. 2685) and has applied to the FPC to build another (FPC Project No. 2729). From Gilboa,

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\* PASNY has a pending application before the New York State Public Service Commission for this segment. (Application of PASNY, N.Y.S. PSC Case No. 26529). The FPC is authorized to hold joint proceedings with state agencies under §209(b) of the Federal Power Act (16 USC 824h(b))

the 765 kv transmission line would enter Greene County and travel eastward across the face of Greene County for some 35 miles on a transmission corridor which is part of Project No. 2685\* to Leeds on the Hudson River in Greene County where PASNY has announced plans to build a 1,000,000 watt nuclear power plant and possibly another power plant of the same size. At Leeds the 765 kv transmission line would leave Greene County, cross the Hudson River and turn to the south to Pleasant Valley where it would link up with the transmission system carrying electricity to New York City.

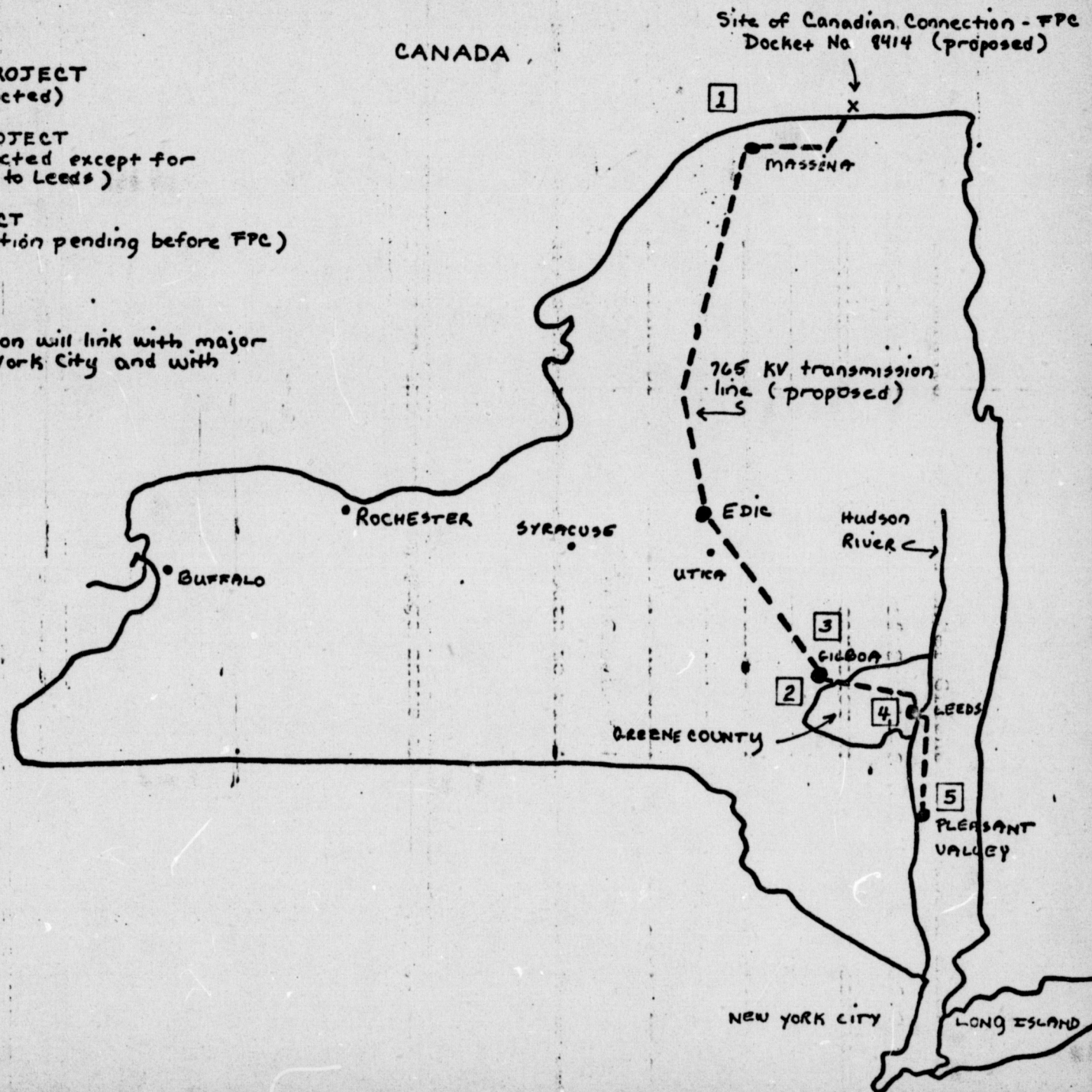
The diagram on the following page shows the route of the proposed 765 kv transmission line from the Canadian Connection to Pleasant Valley.

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\* This corridor has not yet been approved by the FPC. A Presiding Administrative Law Judge of the FPC initially approved the corridor on July 1, 1974. (\_\_\_\_ FPC \_\_\_\_). Exceptions to the approval were taken and the matter is sub judice before the FPC at this time. One of the reasons given by the Presiding Administrative Law Judge for approving the corridor would be its availability for 765 kv transmission from Canada (\_\_\_\_ FPC at \_\_\_\_). This is the third time this Court has been asked to review FPC decisions relating to the so-called Gilboa to Leeds corridor. See the discussion on the page following the diagram on the next page.

# KEY

- 1 PASNY'S ST. LAWRENCE PROJECT  
FPC Project No. 2000 (constructed)
- 2 PASNY'S BLLENHEIM GILBOA PROJECT  
FPC Project No. 2685 (constructed except for  
transmission line from Gilboa to Leeds)
- 3 PASNY'S BREAKABEEN PROJECT  
FPC Project No. 2729 (application pending before FPC)
- 4 PASNY'S NUCLEAR FACILITY  
(proposed)
- 5 Site where 765 KV transmission will link with major  
transmission facilities to New York City and with  
other 765 KV transmission.



The Line Is Part of a Long Range Comprehensive Plan Deeply Affecting Greene County

During this entire decade the Planning Board has been locked in a struggle with both PASNY and the FPC concerning their failure to develop and evaluate a long range, integrated, comprehensive plan which calls for massive construction of electrical generating and transmission facilities in Greene County. This Court has twice before been called upon by the Planning Board to rule on questions involving this network. Greene County Planning Board v. FPC, 455 F. 2d 412 (2d Cir. 1972) cert. den. 499 U.S. 849 (1972) (Greene County I) and Greene County Planning Board v. FPC, 490 F. 2d 256 (2d Cir. 1973) (Greene County II).

Both Greene County I and Greene County II arose in the context of an FPC proceeding (FPC Project No. 2685) involving the segment of the Canada to New York City 765 kv transmission line which was to cross Greene County from Gilboa to Leeds.\* In both Greene County I and Greene County II the Planning Board urged that by restricting its consideration, from the standpoint of environmental

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\* See the footnote on p. 5, supra. The diagram on the proceeding page is derived from Appendix C to the FPC Staff Final Environmental Statement in FPC Project No. 2685 which was before this Court in Greene County II and from the New York Power Pool 1974-1989 plan which PASNY filed with the FPC on May 3, 1974. See also Opinion No. 74-1 of the N.Y.S. Public Service Commission, p.17.

planning, to that segment the FPC was violating both the Federal Power Act and NEPA.

In Greene County I this Court pointed out:

[W]e fail to see how the [FPC], if it is to fulfill the demanding standard of 'careful and informed decision making.' [citation omitted] can disregard impending plans for further power development. ...

[W]e cannot tolerate the [FPC] cutting back on its expanded responsibility by blinding itself to potential developments..." (455 F.2d at 424)

In Greene County II Judge Mansfield commented in dissent:

"That the FPC has failed to prepare the comprehensive impact statement is clear.... Our earlier opinion scored the FPC for its failure to consider impending plans for further power development when it was analyzing a project likely to be influenced by such future development." (490 F.2d at 261)

This case involves one of those then "impending plans for further power development" -- a segment of the 765 kv transmission line and overall system outside of Greene County, but of which the planned segment inside of Greene County will be an integral part.

Greene County Intervenes And Asks for Consolidation

Following notice of the PASNY application for the Canadian Connection in the Federal Register ( FR ) \* the Planning Board moved to intervene under §1.8 of the FPC's rules (18 CFR 1.8) as a party to the Canadian Connection proceeding. The petition to intervene (R. 47) asked also (a) for consolidation of the three pending applications (Project No. 2685, Project No. 2729 and Docket E-8414) before the FPC for the various individual facilities to be a part of the overall scheme, (b) for an environmental impact review of the entire long range, comprehensive, integrated plan and (c) for a public hearing on the matter to compile a record on which a proper decision could be made.

Similarly, Greene County moved in the proceedings involving the other two pending applications (Project No. 2685 and Project No. 2729) for consolidation with the proceeding relating to the Canadian Connection.

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\* No individual notice was given to the parties in either Project No. 2685 or Project No. 2729.

The FPC Plays Its Cat-and-Mouse Games Again

In both Greene County I and Greene County II this Court had occasion to call attention to what Judge Mansfield called the FPC's "cat-and-mouse games" (490 F. 2d at 260). In this case once again the Planning Board is a victim of the FPC's procedural shenanigans.

Although the Planning Board timely filed a petition to intervene on November 7, 1973, the FPC totally ignored it for ten months until September 13, 1974. On the latter date it granted the petition to intervene (R. 130) while simultaneously granting PASNY's permit application! (R. 134)

Naturally, until the petition to intervene was granted, the Planning Board was not a party to the Canadian Connection proceeding and was not permitted or encouraged to present evidence or other information for the record.

Yet, with unabashed arrogance, the FPC declared on September 13, 1974, after a ten month hiatus which it singlehandedly engineered, that:

"Requests made to the Commission by petitioners for the conduct of a public hearing consolidation and impact statement herein clearly must yield [to the urgency expressed by Congress in §7d of ESECA passed July 22, 1974]" (R. 132).

Thus, while de jure granting the right of intervention to the Planning Board, the FPC de facto refused it the right of intervention since it contemporaneously concluded the very proceeding in which intervention was granted by summarily granting PASNY's application. No explanation was given why it took the FPC ten months to decide that PASNY's application was of great urgency.

The FPC's Decision Was Based Upon a Gossamer Thin Record

One of the most striking characteristics of the FPC's September 13, 1974 order and Permit is the stark nakedness of the Record upon which the FPC acted. Not only was there no public hearing of any kind or other opportunity for the intervenors to participate in the decision making process, but also there is no evidence or other indication that, except to receive perfunctory letters of "no comment" from the State and Defense Departments (R. 128-129), the FPC or its staff made any inquiry whatsoever into where the public interest lay in this matter.

Without any supporting record of any kind, the FPC in the September 13, 1974 Permit baldly stated:

"Upon consideration of this matter, the Commission finds that the issuance of the Permit as hereinafter provided is appropriate and consistent with the public interest." (R. 136)

No findings of fact were made. No reference was made to any evidence. No explanation of relevant public interest considerations was given. There was a good reason for this paucity of decisional expression -- the Record transmitted by the FPC to this Court in this case is an empty bag, wholly lacking any basis for the FPC's order and Permit. The Emperor's New Clothes are a wardrobe compared to the FPC's record in this case.

Indeed, the only justification proffered by the FPC for its actions, both in its September 13, 1974 order (R. 131-132) and in its denial of rehearing (R. 144-150), was Section 7(d) of ESECA (Ad. A) which the FPC construed as directing the FPC immediately, and without examination, to issue the permit for the Canadian Connection. This, however, as discussed in detail below, was an erroneous reading of the law and is brought to this Court now for review.

POINT I

THE FPC ERRONEOUSLY CONCLUDED  
THAT ESECA EXEMPTED THE  
CANADIAN CONNECTION FROM NEPA

The FPC candidly admits that it did not comply with NEPA in approving the Canadian Connection permit and that it regarded

"all provisions of NEPA to be inapplicable to the Commission's action concerning the facilities which are covered by the permit."  
(R. 147)

This is wrong as a matter of law.

The sole basis for the FPC's contention that NEPA was inapplicable is Section 7(d) of ESECA enacted June 22, 1974, the entire text of which is set forth at page A of the Addendum to this brief. However, Section 7(d) does not say that NEPA is inapplicable to the Canadian Connection. Section 7(d) merely authorizes the issuance of a permit for the Canadian Connection by the FPC

"without preparing an environmental impact statement pursuant to Section 102 of the National Environmental Policy Act of 1969..."  
(Ad. A).

As has been established beyond all doubt, the environmental statement requirement of §102(2)(C) of NEPA is far from all that there is to NEPA. Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,

449 F. 2d 1109 (D.C. Cir. 1971), cert. den. 404 U.S. 942 (1972); Hanly v. Kleindienst, 471 F. 2d 823 (2d Cir. 1972), cert. den. 412 U.S. 908 (1973).

Thus this Court in Hanly v. Kleindienst identified "the procedural mandates of Sections 102(2)(A), (B) and (D)" (471 F. 2d at 834) as wholly independent requirements of NEPA which stand on their own. These provisions must be complied with whether or not the environmental statement requirement under NEPA Section 102(2)(C) applies to the action.

Relieving the FPC of the environmental statement requirement of NEPA Section 102(2)(C) does not relieve it from the rest of NEPA.

A. The Plain Meaning of ESECA Is That All Parts of NEPA Other Than Section 102(2)(C) Were to Remain Applicable to the Canadian Connection

Section 7(d) of ESECA is quite specific and unambiguous in its language. While it recites a congressional purpose

"to expedite the prompt construction of facilities" (Ad. A),

it does not direct an immediate rubber stamp approval of such facilities. It carefully requires compliance with Executive Order 10485 by stating:

"the Federal Power Commission is hereby authorized and directed to issue a Presidential permit pursuant to Executive Order 10485" (Ad. A).  
(Emphasis supplied).

It does not at all state that all other provisions of applicable law, such as the Federal Power Act,\* must stand aside. In fact, the only specific requirement set aside by Congress in the interest of expediting the review of the project is the necessity to prepare

"an environmental impact statement pursuant to section 102 of the National Environmental Policy Act of 1969" (Ad. A).

In this respect ESECA §7(d) stands in stark contrast to the congressional authorization for the Alaska Pipeline (43 USC §§ 1651-1655). There, Congress specifically ordered the project to go forward,

"promptly without further administrative or judicial delay or impediment." (43 USC §1652(a)).

To implement this purpose, Congress swept NEPA aside stating:

"The actions taken pursuant to this title...shall be taken without further action under the National Environmental Policy Act of 1969..." (43 USC §1652 (d)).

The Alaska Pipeline legislation demonstrates how Congress acts when it specifically authorizes something to be done

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\* See discussion in Point II of this brief.

forthwith and without following procedures established in related laws. On the other hand, ESECA §7(d) accomplishes far less. It shows a congressional intent only to exempt the Canadian Connection from one potentially time consuming requirement of law, i.e. the environmental statement under NEPA §102(2)(C). The FPC, however, has failed to understand this and has instead construed ESECA §7(d) as if it were the same as the Alaska Pipeline authorization. It plainly is not. ESECA §7(d) by its terms, by its context, and by comparison with other NEPA exceptions, is not a blanket exception of the Canadian Connection for NEPA.

ESECA itself contains other NEPA exceptions. For example the section immediately preceeding §7(d) points up Congress' awareness of the distinction between the environmental statement requirement of NEPA §102(2)(C) and other provisions of NEPA (ESECA §7(c)). Thus in Section 7(c), when referring to all of NEPA, Congress used the language "the full provisions of the National Environmental Policy Act"-- a far cry from the significantly limited language of ESECA §7(d).

The plain meaning of ESECA §7(d) is that it exempted the Canadian Connection only from the preparation of the environmental statement required by NEPA. The FPC erred when it ruled otherwise. Its restrictive reading of

§ 7(d) and its obligations under NEPA flagrantly disregard Congress' direction that "to the fullest extent possible" agencies should interpret and administer their laws in accordance with the policies of NEPA. See, e.g., Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, supra. This Court should correct the FPC.

B. It is Undisputed That There Has Been No Compliance With NEPA

Although the FPC asserts (R. 148) that the objections of the Planning Board in this matter have been "considered" there is not a shred of evidence in the Record to support this assertion.\* Rather, it is plain that the FPC did not even attempt to

"utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and environmental design arts in planning and in decision-making which may have an impact on man's environment;" (NEPA §102(2)(A)) (Ad. B)

or to

"study, develop, and describe appropriate alternatives to recommended courses of action in any

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\* See also the FPC's outrageous misstatement, (R. 150) that it had made a "detailed discussion" of the Planning Board's objections in its September 13, 1974 order. Such order (R. 130) in fact contains no such discussion.

proposal which involves unresolved conflicts concerning alternative uses of available resources;" (NEPA §102(2)(D)) (Ad. C)

or, in this matter involving massive new hydroelectric projects in both the United States and Canada and requiring hundreds of miles of new 765 kv transmission lines, to

"recognize the worldwide and long range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." (NEPA §102(2)(E)) (Ad. C).

Finally, by refusing to hold a public hearing and by engaging in a charade permitting de jure intervention while effectively denying it de facto, the FPC has violated the mandate of NEPA to

"identify and develop methods and procedures...which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations" (NEPA §102(2)(b)) (Ad. B)

Since ESECA does not exempt the Canadian Connection from NEPA and since there has not even been an attempt of any kind to comply with NEPA, the FPC's action in approving the Canadian Connection was in violation of law and must be set aside.

## POINT II

THE FPC ERRONEOUSLY DECIDED THAT  
IT HAD NO OBLIGATION UNDER THE  
FEDERAL POWER ACT AND EXECUTIVE ORDER NO. 10485  
TO MEET ITS COMPREHENSIVE PLANNING OBLIGATIONS  
WHEN PASSING ON THE CANADIAN CONNECTION

In issuing a permit for the Canadian Connection the FPC claimed that it had no comprehensive planning responsibilities under the Federal Power Act in such action asserting that

"PASNY's application for the permit for those facilities was correctly filed under Executive Order No. 10485 and not under the [Federal] Power Act." (R. 147).

This ignores the explicit dependence of Executive Order No. 10485 on the Federal Power Act, the requirement that such permits be consistent with the "public interest" and the relationship between the Canadian Connection and hydroelectric projects subject to Part I of the Federal Power Act. It is a narrow, irrational and wholly improper interpretation of the applicable law.

A. Executive Order No. 10485 Is a Child of the Federal Power Act

The FPC's assertion that because PASNY's application was under Executive Order No. 10485 (Ad. C) the Federal Power Act was not involved flies in the face of the very language of the Executive Order and its own

regulations (See 18 CFR 32.50(b)). The very first paragraph of the Executive Order states that the statutory basis for the Order is the Federal Power Act:

"Whereas section 202(e) of the Federal Power Act...requires any person desiring to transmit any electric energy from the United States to a foreign country to obtain an order of the Federal Power Commission authorizing it to do so:..."

(Executive Order No. 10485) (Ad. C).\*

Section 202(e) of the Federal Power Act, the entire text of which appears at page A of the Addendum to this Brief, in pertinent part provides:

"The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. (emphasis supplied)

The FPC's regulations under the Executive Order (18 CFR 32.50 - 32.52) specifically integrate the Executive Order with Section 202(e). See 18 CFR 32.50(b).

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\* It is admitted that among the purposes of the Canadian Connection is "to permit the exchange of power [between Canada and the United States]" (R. 6, 16) (emphasis added). Obviously, PASNY needs permission under Section 202(e) of the Federal Power Act to do that entirely apart from Executive Order 10485.

Section 7(d) of ESECA, upon which the FPC so heavily relies, authorizes and directs the FPC to act "pursuant to Executive Order 10485" (emphasis supplied) (Ad. A).

Regardless of the impact § 7(d) of ESECA may have had on the FPC's obligations under NEPA, it is abundantly clear that §7(d) was not intended to abrogate the FPC's obligations under the Federal Power Act. These obligations involve both the opportunity for a public hearing and a comprehensive planning function to insure that the applied for facility will fit into the scheme of other facilities under the FPC's jurisdiction.

As discussed above, the Canadian Connection is part of a comprehensive, long range, integrated plan involving facilities not yet licensed as part of Projects Nos. 2685 and 2729. It is also intimately related to another hydroelectric project licensed by the FPC and operated by PASNY on the St. Lawrence River (R. 6, 15) (FPC Project No. 2000). Therefore, even if Part II of the Federal Power Act is considered in isolation from Part I, the FPC is wrong when it disclaims any analytical responsibilities in this case.

What the FPC did was to latch on to a narrow exemption and abrogate its responsibilities for broad review in the public interest.

For this reason, the FPC erred when it approved the

Canadian Connection without exercising its comprehensive plan judgment.

B. The Relationship Between the Canadian Connection and Projects Under Part I of the Federal Power Act Brings It Within The FPC's Comprehensive Planning Obligations

Of course Part II of the Federal Power Act cannot be considered in isolation from Part I; and this makes the FPC's decision in this case even worse. The FPC is actively considering license applications in Projects Nos. 2685 and 2729. Those applications are under Part I of the Federal Power Act, and undisputedly involve "a project within the meaning of Sections 3(11) and 10(a) of the Power Act" (R. 147) and are "subject to the Commission's 'comprehensive plan' judgment under Section 10(a)" (R. 147). Most specifically, Project No. 2685 involves, as a "primary line" (16 USC 796(11)), a 35 mile proposed segment within Greene County of the 765 kv line which will go from Canada via the Canadian Connection toward New York City. By closing its eyes to that segment in the Canadian Connection proceeding, the FPC will make it impossible to exercise its comprehensive plan judgment in Project No. 2685 because there it will be facing a fait accompli as to an integral part of the overall plan into which the 765 kv line in Project No. 2685 is to fit. Greene County will find itself with a power line justified by the Canadian Connection approved in a manner wholly disregarding

Greene County's concerns.

Just as section 202(e) of the Federal Power Act requires the FPC to consider how international connections fit into an overall plan, section 10(a) of the Federal Power Act requires the FPC to consider how "primary lines" and other facilities part of a "project" fit into an overall plan. Greene County I, supra; Scenic Hudson Preservation Conference v. FPC, 354 F. 2d 608 (2d Cir. 1965) cert. denied 384 U.S. 941 (1966); State of California v. FPC, 345 F. 2d 917 (9th Cir. 1965) cert. denied 384 U.S. 941 (1966); City of Pittsburg, v. FPC, 237 F. 2d 741 (D.C. Cir. 1956). The FPC cannot circumscribe its obligations under Section 10(a) of the Federal Power Act by claiming that related facilities are outside of its direct Section 10(a) powers. Yet this is precisely what the FPC has attempted to do when it ruled in its order denying rehearing in this case:

"In short, the Commission's licensing jurisdiction under Part I of the Power Act does not extend to the 765 kv transmission line and related facilities which were the subject of PASNY's application" (R. 148).

The mere fact that PASNY's application for the Canadian Connection was not filed under Part I of the Federal Power Act does not mean that the FPC can ignore Part I when it has before it at the same time applications

under Part I for related facilities to be built by the same applicant. The FPC is required to look through formal labels put on applications by applicants before it. In the watchwords of administrative law issued by this court, the FPC may not

"act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." Scenic Hudson, supra, 354 F. 2d at 620.

What the FPC has done in this case is to permit the applicant to truncate FPC responsibility by accepting without question the order, timing and labeling of applications. This is plainly incorrect. The FPC has the affirmative obligation to see that its licensees and applicants proceed in an orderly fashion consistent with intelligent long range planning and not in a segmented ad hoc matter. See City of Pittsburgh, supra. See also Conservation Society v. Secretary 73-2629 (2d Cir. 1974).

Thus, the intimate relationship between PASNY's Canadian Connection and PASNY's St. Lawrence, Blenheim Gilboa and Breakabeen Projects under Part I of the Federal Power Act brings the Canadian Connection within the FPC's comprehensive planning requirements of §10(a) of the Federal Power Act. Yet, in this case the FPC admittedly did not exercise what it called its "'comprehensive plan' judgment". (R. 147).

C. The Executive Order's "Public Interest" Requirement  
Itself Involves A Comprehensive Review

Entirely apart from the Federal Power Act, there exists Executive Order No. 10485 which ESECA §7(d) says any Canadian Connection Permit must be issued "pursuant to" and which the FPC claims was the sole ground for its action under

"certain authority delegated to  
it by the President of the United  
States" (R. 149).

Assuming this simplistic notion to be true, even under Executive Order No. 10485 the FPC does not have the naked right to rubber stamp because the Executive Order itself limits FPC action except

"Upon finding the issuance of  
the permit to be consistent  
with the public interest..."  
(Executive Order No. 10485,  
§1(a)(3)) (Ad. D) (emphasis supplied).

It is well established that the "public interest" standard in Federal administrative law is one which, in order not to be unconstitutionally vague, takes its meaning from the context of the regulatory scheme in which it is used. N.Y. Central Securities Co. v. U.S., 287 U.S. 12, 24 (1932) and Federal Radio Commission v. Nelson Bros. B and N Co., 289 U.S. 266, 285 (1933).

The very fact that Executive Order No. 10485 delegates certain power to the FPC, which is a comprehensive planning agency under both §10(a) and §202(e) of the Fed-

eral Power Act, indicates that the delegated authority was intended to be exercised in the light of that statute. This conclusion is reinforced by the fact that the Executive Order refers specifically to §202(e) as do the FPC's own regulations implementing the Executive Order (See 18 CFR 32.50(b)). In addition, it is clear that the whole purpose of the Executive Order was to integrate what was seen to be a presidential foreign policy matter with overall electrical system planning. The Executive Order recites in its preamble:

"it is desirable to provide a systematic method in connection with the issuance and signing of permits for such purposes" (Ad. D).

The Supreme Court of the United States has defined "public interest" in such context as follows:

"The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the 'public interest' including future power demand and supply, alternate sources of power [etc.]" Udall v. FPC, 387 U.S. 428, 450 (1967).

Thus, to make a "public interest" finding under Executive Order No. 10485 the FPC must exercise a substantive comprehensive planning function and must compile a record against which its decision can be tested.

Furthermore, in the first Scenic Hudson case this Court pointed out that, along with substantive require-

ments, the meeting of a "public interest" standard also carried with it certain procedural obligations

"The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts" (354 F. 2d at 620).

Therefore, under Executive Order No. 10485, to make a public interest finding the FPC must have properly permitted public participation, compiled a reviewable record, considered alternatives and considered all relevant factors. See also Hanly v. Mitchell, 460 F. 2d 640 (2d Cir. 1972) cert. den. 409 U.S. 990 (1972) and Hanly v. Kleindienst, 471 F. 2d 823 (2d Cir. 1972) cert. den. 412 U.S. 908 (1973) for a full discussion of the procedural necessities surrounding administrative "public interest" type determinations.

In the New York Central case, *supra* (287 U.S. at p. 24) the Supreme Court held that "public interest" language is not defined in a vacuum but takes its meaning from the regulatory context.

This Court has itself defined the regulatory context in which the FPC is to search for the "public interest".

"Congress gave the Federal Power Commission sweeping authority and a specific planning responsibility [citation omitted] instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws" Scenic Hudson I, *supra*, at 613-14.

In addition, there is the strong statement of public policies in NEPA to give meaning to "public interest" in Executive Order 10485.

Rather than search for and serve this public interest, the FPC has once again chosen the role of ostrich.

As can be seen from the virtually non-existent record in this case, from the perfunctory and conclusory orders issued by the FPC in this case and as discussed in detail below, the FPC met neither the substantive nor the procedural requirements of the "public interest" standard of Executive Order No. 10485 in granting the Permit for the Canadian Connection.

Even the skimpy, inadequate record contains fundamental errors requiring denial of the permit. For example, Executive Order No. 10485 requires "the favorable recommendations of the Secretary of State and the Secretary of Defense."

The Secretary of Defense, however, was "not aware of any existing reason to withhold approval" (R. 128), hardly a "favorable recommendation". In addition, each Secretary (R. 128, 129) erroneously believed that the sole purpose for the Canadian Connection was to bring power into the United States. The fact is that power will admittedly flow both ways and may possibly result in a net power loss to this country (R. 100).

Had the Secretaries realized this, their opinions may have been negative.

D. By Summarily Issuing the Permit, the FPC Has Violated Both the Federal Power Act and the Executive Order

As discussed in detail above, there are, in addition to NEPA, three independent bases for the requirement that the FPC meet its comprehensive planning obligations in reviewing the Canadian Connection: (a) Section 202(e) of the Federal Power Act, (b) Section 10(a) of the Federal Power Act, and (c) Executive Order No. 10485. Since ESECA §7(d) does not exempt the Canadian Connection from any of these mandates, if the FPC did not meet such obligations in issuing the Permit for the Canadian Connection, then it erroneously issued such permit. There is nothing in the Record which indicates that such obligations were met. On the contrary, there is every indication that such obligations were ignored.

1. The FPC Did Not Permit Adequate Public Participation

Although the FPC permitted the Planning Board and two other parties to intervene (R. 130 et. seq.), it did so at a time and in a manner which effectively eliminated them from participation in the administrative proceeding (See discussion above at p.10 of this brief). Furthermore, although opportunity for hearing exists under Section 202(e)

of the Federal Power Act and is a customary device for obtaining public participation in administrative decision making, the FPC denied all requests in this matter for a public hearing. Compare, Hanly v. Kleindienst, 471 F. 2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

It is a fundamental principle that an adequate provision for public participation is a prerequisite for administrative "public interest" findings.

2. The FPC Did Not Compile  
A Reviewable Record

Both the Federal Power Act (§313(b); 16 USC §821 1(b)) and the Administrative Procedure Act ( 5 USC 706 ) provide for court review of FPC decisions. This provision for court review obligates the FPC to develop a reviewable record and an articulated decision in order that this Court can determine if the decision is proper.

In the case the FPC neither made a proper record nor rendered an adequate decision (See discussion above at p. 11 of this brief).

Consequently there is no basis upon which this Court can uphold the FPC's helium filled "public interest" finding.

3. The FPC Did Not Consider  
All Relevant Factors

As this Court explained definitively in the first Scenic Hudson case, to exercise its comprehensive planning obligations and "public interest" review under the Federal Power Act, the FPC must consider all relevant factors (See discussion at p.25 of this brief.)

Although the Planning Board called to the FPC's attention the relevancy of other PASNY planned facilities to the Canadian Connection, the FPC persisted in ignoring them thus "blinding itself to potential developments" (Greene County I, 455 F 2d at 424).

As this Court has recently pointed out in Conservation Society v. Secretary, supra, the FPC cannot hide behind the assertion (R. 149) that there is no overall Federal plan or that portions of the 765 kv line are to be built under state law. In this case, the Canadian Connection must be Federally approved, the Gilboa to Leeds segment must be Federally approved and the Edic to Gilboa segment is possibly a primary line part of FPC Project No. 2729 which must be Federally approved.

If the Canadian Connection is permitted, then some transmission south of that inevitably follows. If lines are built from Massena to Edic and from Gilboa to Leeds, the gap between Edic and Gilboa must be inevitably filled. Indeed, if any segment is built, all the segments must

follow. This is even more true of high voltage transmission lines than of highways. With highways, a short segment can at least take someone some place. With transmission lines, nothing works unless the whole system is connected up. Indeed, both PASNY's application and the FPC's notice (R. 4, 45) acknowledge that PASNY has already applied to New York's Public Service Commission for another segment to connect to this one.

This Court surely can take judicial notice that the quantities of electricity which can be transmitted by 765 kv cannot be used in any of the small rural communities at Fort Covington, Massena, Edic, Gilboa or Leeds -- or indeed at all of them put together.

The integrated nature of the planned 765 kv network is a highly relevant consideration in the Canadian Connection case. Yet this relevant factor, along with many others, was ignored by the FPC.

#### 4. The FPC Did Not Consider Alternatives

It has long been the law that the FPC's comprehensive planning and "public interest" responsibilities include a proper consideration of alternatives. Thus in the first Scenic Hudson case, this Court set aside the FPC's decision stating:

"There is no doubt that the Commission is under a statutory duty to give full consideration to alternative plans" 345 F. 2d at

Likewise, in City of Pittsburg, supra, it was held:

"The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity." 237 F. 2d at 751, n. 28

In this case, no alternatives of any kind were considered by the FPC. Without looking to see what alternatives there may be to an exchange of power with Canada or what alternatives there might be to the Fort Covington site or what alternatives there are to 765 kv transmission, it was impossible for the FPC to make a "public interest" finding or to exercise its comprehensive planning function.

5. The FPC's "Public Interest" Finding  
Was Not Supported by Substantial Evidence,  
Was Arbitrary and Capricious and Was Unreasonable

The FPC should have held an adjudicatory hearing on the Canadian Connection under §202(e) of the Federal Power Act or in the exercise of its licensing powers under Part I of such Act. It did not. Consequently, there is no substantial evidence under the Administrative Procedure Act to support the FPC's decision.

Even if no adjudicatory hearing was required, however, the FPC's decision does not meet the "arbitrary and cap-

ricious" test of the Administrative Procedure Act (5 U.S.C. §706(2)(A); Citizens to Preserve Overton Park v. Volpe 401 U.S. 402 (1971); Camp v. Pitts, <sup>411</sup>U.S. 138 (1973); Hanly v. Kleindienst, supra.):

"to make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 416

As thoroughly discussed above, the FPC neither considered the relevant factors nor conducted the proceeding in a manner calculated to bring such factors forward. Therefore, the "public interest" finding by the FPC in this case was arbitrary, capricious and unreasonable.

Without a valid "public interest" finding, and without the exercise of the FPC's comprehensive planning judgment, there can be no compliance with the Federal Power Act and Executive Order No. 10485 -- or with ESECA which specifically requires compliance with both the Act and the Order. The FPC erred in granting the Permit for the Canadian Connection.

CONCLUSION

The FPC has treated ESECA § 7(d) as ordering the forthwith approval of the Canadian Connection. However, ESECA § 7(d) did not abrogate most of the FPC's duties under NEPA, the Federal Power Act and Executive Order No. 10485. The FPC did not perform those duties but instead summarily issued the Canadian Connection Permit. This was in error. The Permit must be set aside and the case remanded to the FPC for compliance with NEPA (other than §102(2)(C) thereof) and for the exercise of the FPC's "public interest" and comprehensive planning judgment on a properly compiled full record.

March 24, 1975

Respectfully submitted

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## ADDENDUM

### Excerpts From Relevant Statutes

1. Energy Supply and Environmental Coordination Act of 1974 -  
Section 7(d) (88 Stat. 246)

"In order to expedite the prompt construction of facilities for the importation of hydro-electric energy thereby helping to reduce the shortage of petroleum products in the United States, the Federal Power Commission is hereby authorized and directed to issue a Presidential permit pursuant to Executive Order 10485 of September 3, 1953, for the construction, operation, maintenance, and connection of facilities for the transmission of electric energy at the borders of the United States without preparing an environmental impact statement pursuant to section 102 of the National Environmental Policy Act of 1969 (83 Stat. 856) for facilities for the transmission of electric energy between Canada and the United States in the vicinity of Fort Covington, New York."

2. Federal Power Act - Section 202(e) (16 USC 824a(e))

"After six months from the date on which this Part [§§824-824h of this title] takes effect, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find

necessary or appropriate, and may from time to time, after opportunity for hearing and good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

3. The National Environmental Policy Act - Section 102  
(42 USC Section 4332)

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§4321, 4331-4335, 4341-4347], and (2) all agencies of the Federal Government shall -

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§4341-4347], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [5 USCS §552], and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act [42 USCS §§4341-4347]

4. Executive Order 10485 (3 CFR 1949-53 Comp., p. 970)

"WHEREAS section 202(e) of the Federal Power Act, as amended, 49 Stat. 847 (16 U.S.C. 824a (e)), requires any person desiring to transmit any electric energy from the United States to a foreign country to obtain an order of the Federal Power Commission authorizing it to do so; and

"WHEREAS the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities for the exportation or importation of electric energy and natural gas; and

WHEREAS it is desirable to provide a systematic method in connection with the issuance and signing of permits for such purposes:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

Section 1. (a) The Federal Power Commission is hereby designated and empowered to perform the following-described functions:

(1) To receive all applications for permits for the construction, operation, maintenance or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country.

. . . .

(3) Upon finding the issuance of the permit to be consistent with the public interest, and, after obtaining the favorable recommendations of the Secretary of State and the Secretary of Defense thereon, to issue to the applicant, as appropriate, a permit for such construction, operation, maintenance, or connection. The Commission shall have the power to attach to the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.

. . . .

Sec. 2. The Chairman or Acting Chairman of the Federal Power Commission is hereby designated and empowered to sign any permits issued by the Federal Power Commission pursuant to section 1(a)(3) hereof.

Sec. 3. The Federal Power Commission is authorized to issue such rules and regulations, and to prescribe such procedures, as it may from time to time deem necessary or desirable for the exercise of the authority delegated to it by this order."

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Greene County Planning Board,	)	
Petitioner	)	
	)	
v.	)	AFFIDAVIT OF
	)	SERVICE BY MAIL
Federal Power Commission,	)	
Respondent,	)	No. 74-2638
	)	
Power Authority of the State	)	
of New York,	)	
Intervenor.	)	

State of New York) )  
County of Warren ) SS:

Patti G. Holmquist, being duly sworn deposes and says:  
that deponent is over the age of 18 years; that deponent is not  
a party in this action; that deponent served two copies of the  
foregoing Brief of Petitioner upon Steven A. Taube, Esq. and  
Scott B. Lilly, Esq. on the 31st day of March, 1975 in the  
following manner:

I deposited two copies of the Brief of Petitioner enclosed  
in a post paid wrapper addressed to Steven A. Taube, Esq.  
Federal Power Commission, 825 N. Capitol Street, N.E., Washington  
D.C. 20000 and Scott B. Lilly, Esq., Power Authority of the  
State of New York, 10 Columbus Circle, New York, New York 10019  
in an official depository under the exclusive care and custody  
of the United States Postal Service in Glens Falls, New York.

Patti G. Holmquist  
Patti G. Holmquist

Sworn to before me this

31<sup>st</sup> day of March, 1975

RA YKL  
Notary Public

ROBERT J. KAFIN  
Notary Public, State of New York  
No. 31-7136019  
Qualified in Warren County  
Commission Expires March 30, 1976

